

STATE OF MICHIGAN
COURT OF APPEALS

MIRIAM PATULSKI,

Plaintiff-Appellant,

v

JOLENE M. THOMPSON, RICHARD D.
PATULSKI, and JAMES PATULSKI,

Defendants-Appellees.

UNPUBLISHED

September 30, 2008

Nos. 278944

Manistee Circuit Court

LC No. 06-012366-CK

MIRIAM PATULSKI,

Plaintiff-Appellant,

v

JOLENE M. THOMPSON, RICHARD D.
PATULSKI, and JAMES PATULSKI,

Defendants-Appellees.

Nos. 280033

Manistee Circuit Court

LC No. 06-012366-CK

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff appeals as of right the June 11, 2007 grant of summary disposition in favor of defendants (Docket No. 278944) and the August 6, 2007 order setting the specific amount of sanctions owed by plaintiff (Docket No. 280033) in this breach of fiduciary duty case. Summary disposition was granted under MCR 2.116(C)(7), (8), and (10). We affirm.

This case involves a property lease entered into under a durable power of attorney signed by plaintiff. The leased property is a garage owned by plaintiff. Plaintiff claims that she and her son, Bruce Patulski, jointly operate a business out of the garage, which has been ordered to vacate the premises under the lease. Plaintiff concedes that the validity of the lease has been litigated in district court and is barred by res judicata. The only relief plaintiff now claims she is entitled to is in excess of \$25,000 in damages for breach of fiduciary duty, which she argues is not similarly barred.

Plaintiff asserts that her breach of fiduciary duty claim is not barred by res judicata because it is a different cause of action than the previous claims in the district court, which sought to invalidate the lease. She also asserts that because the amount in controversy exceeds \$25,000, she could not have raised this particular claim in district court because the court lacked jurisdiction. “Whether a court has subject-matter jurisdiction is a question of law,” reviewed de novo on appeal. *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 37; 494 NW2d 787 (1992). The applicability of the doctrine of res judicata is also a question of law reviewed de novo, as is a ruling on a motion for summary disposition. *Phinisee v Rogers*, 229 Mich App 547, 551-552; 582 NW2d 852 (1998).

Our Supreme Court recently addressed the doctrine of res judicata, stating:

The doctrine of res judicata bars a subsequent action when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. The doctrine bars all matters that with due diligence should have been raised in the earlier action. [*Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008) (quotation marks and citations omitted).]

The prior district court cases were summary proceedings under MCL 600.5701 *et seq.* Defendants describe the cases as follows in their brief on appeal:

Bruce argued in the first District Court action that James’s lease was invalid because it had been entered contrary to the wishes of Miriam, and hence in violation of Jolene and Richard’s fiduciary duties; the District Court rejected this argument. In the second action, the District Court held that Miriam was in privity with Bruce, so that the prior adjudication against him was binding on her as well.

Plaintiff describes the nature of those summary proceedings similarly. Plaintiff states that in the first case, both the district and circuit courts concluded that her son, defendant James Patulski, was entitled to possession of the garage under the terms of the lease, and that in the second case the district court dismissed the claim as barred by res judicata from the first case. Therefore, plaintiff concedes that the issue regarding the validity of the lease is barred by res judicata. Plaintiff asserts, however, that she is nonetheless entitled to in excess of \$25,000 in damages for breach of fiduciary duty. The circuit court dismissed the request for damages based on the fact that plaintiff offered no specific evidence, besides her own affidavit that contained no amount of loss, to create a material dispute as to whether she suffered any damages. The circuit court granted summary disposition to defendants on the breach of fiduciary duty claim under MCR 2.116(C)(7).

Underlying this issue is what was actually litigated in the two district court cases. Defendants’ brief on appeal states that in the first district court action, Bruce defended his exclusion of James from the garage by “arguing that the lease was a violation of fiduciary duties because Jolene had failed to clear it with [plaintiff] in advance, that the lease was below market, and that James had not paid the rent under the lease.” However, defendants do not cite to anything in the record to support the assertion that plaintiff made this argument during the first

district court case, and plaintiff does not address whether this argument was raised. “A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim.”¹ *Nat’l Waterworks, Inc v Int’l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Regardless whether it was raised, plaintiff’s claim of breach of fiduciary duty “with due diligence should have been raised” and could have been raised in the district court. See *Estes, supra* at 585. Plaintiff is correct that summary proceedings in an action to gain possession of property do not preclude other claims for relief. MCL 600.5750 (“A judgment for possession under this chapter does not merge or bar any other claim for relief . . .”). However, the instant claim is not another claim for relief. The prior findings by the district court that the lease is valid and that James was entitled to possession involved an implicit finding that defendants Jolene and Richard properly exercised their fiduciary duty in executing the lease. The court in the second district case explicitly stated that, “no cause is shown why the property should not be returned to [James’s] possession.”

Plaintiff directs us to *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 169-170; 600 NW2d 617 (1999), where our Supreme Court concluded that a prior decision in a summary proceeding that a sublease was null and void did not preclude subsequent claims against the defendant. But, *JAM Corp* is distinguishable from the instant case. The subsequent claims in *JAM Corp* arose not from the written contract that the district court found to be null and void, but from a theory of implied contract. *Id.* at 169. The instant case and the prior district court cases all arose from the very same lease entered into pursuant to the power of attorney document.

Further, in *JAM Corp*, the Supreme Court interpreted MCL 600.5750, stating:

That provision evidences the Legislature’s intent that summary proceedings for possession of property be handled expeditiously. Plainly the Legislature took these cases outside the realm of the normal rules concerning merger and bar in order that attorneys would not be obliged to fasten all other pending claims to the swiftly moving summary proceedings. [*JAM Corp, supra* at 168-169.]

In the instant case, however, plaintiff’s claim of breach of fiduciary duty is not a different pending claim. Plaintiff, in privity with Bruce, originally claimed that the lease was invalid because it was entered into against her wishes. Here, plaintiff is claiming a breach of fiduciary duty resulting in emotional distress, again because the lease was entered into against her wishes. As indicated *infra*, the district court’s finding that the lease is valid indicates that the lease was

¹ This Court has obtained a copy of the district court file, and review of it confirms that when contesting the lease, Bruce Patulski alleged that Jolene Thompson was acting contrary to her fiduciary duties when she executed the lease. Following a bench trial, the district court made specific findings of fact and concluded that “Miriam Patulski was competent to execute the durable power of attorney” and that “Jolene Thompson had the authority to lease the premises.”

properly entered into. Because the lease was properly entered into, there cannot be a finding of breach of fiduciary duty based on plaintiff's allegation that it was not.

Additionally, we find that plaintiff's claim of breach of fiduciary duty should have been raised in the district court because the facts and evidence essential to the claim are identical to those in the prior actions. "[T]he test to determine whether . . . two actions involve the same subject is whether the facts are identical in both actions or whether the same evidence would sustain both actions. If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata." *Michigan Dep't of Transportation v North Central Co-op, LLC*, 277 Mich App 633, 645; 750 NW2d 234 (2008), overruled on other grounds *Michigan Dep't of Transportation v Initial Transport, Inc*, 481 Mich 862; 748 NW2d 239 (2008). In claiming that the lease was invalid in the district court, plaintiff, in privity with Bruce, would have alleged that Jolene and Richard entered into the lease against plaintiff's wishes and against her best interest because the rent was very low. These facts are the same facts plaintiff now alleges to establish her claim that defendants breached their fiduciary duty. Because the facts are identical and the same evidence would sustain both actions, the instant claim is barred by res judicata. See *Id.*

Plaintiff also contends that the district court did not have jurisdiction over the instant claim because the amount in controversy exceeds \$25,000. See MCL 600.8301(1) ("The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000.00."). Plaintiff argues that if the district court lacked jurisdiction to hear the claim, the claim cannot be barred by res judicata for failure to raise it in the prior proceeding. We disagree. Plaintiff had the opportunity to raise the claim in district court and then have the claim removed to the circuit court on the basis of the amount in controversy. Plaintiff did not do so. As discussed *infra*, because the facts and evidence essential to the instant claim are identical to those in the prior actions, plaintiff, in privity with her son, could have raised the issue of monetary damages in the district court.

Because of our conclusion that plaintiff's claim was properly dismissed under MCR 2.116(C)(7), we need only also address plaintiff's request to reverse the circuit court's grant of attorney fees and costs to defendants. All other issues are moot.

The trial court granted fees and costs to defendants based on its determination that plaintiff's claim was frivolous. Under MCL 600.2591(3)(a) and MCR 2.625(A)(2), an action is deemed frivolous if (1) the party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true; or (3) the party's legal position was devoid of arguable legal merit. We have observed that a "plaintiff's inability to prove its case by a preponderance of evidence at trial does not merit a finding that its claim was frivolous." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). It follows that plaintiff's inability to prove her claims at the summary disposition stage alone does not merit a finding that the claim was frivolous. Thus, the circumstances of the case should be examined when making the determination. Cf. *In re Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002) ("To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made.").

Plaintiff asserts that her breach of fiduciary duty claim cannot be deemed frivolous because her affidavit created genuine issues of material fact as to whether she suffered damages and because the claim was supported by the direct actions of Jolene and Richard in breaching their fiduciary duties, and by James's actions under an aiding and abetting theory – a theory which plaintiff believed had legal merit at the time that the claim was filed. But, as indicated *infra*, the circuit court properly concluded that plaintiff's breach of fiduciary duty claim was barred by res judicata. The district court had previously found that the lease is valid, implicitly indicating that Jolene and Richard properly exercised their fiduciary duties in executing the lease, and that James was entitled to possession. Considering the district court's previous findings, plaintiff should have known that her breach of fiduciary claim as to all three defendants was without legal merit, as it was based on the same facts as the prior actions. Plaintiff could not have reasonably believed that the instant claim was a new or different claim than those previously litigated at the district court level.

We affirm the grant of summary disposition under MCR 2.116(C)(7) and the award of attorney fees and costs.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering